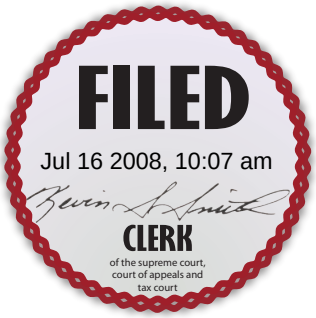

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IN THE
COURT OF APPEALS OF INDIANA

VINOD GUPTA,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 31A01-0711-CV-532
	)	
GARY T. HUBBUCH,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable H. Lloyd Whitis, Judge
Cause No. 31C01-0410-MI-60

July 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Vinod Gupta appeals from the trial court's decision denying him a tax deed on property purchased at a tax sale or a refund for the money paid. Gupta contends that the trial court improperly revisited its earlier decision granting him a tax deed and that, even if he is not entitled to a tax deed, he is entitled to a refund of his purchase price. We affirm in part, reverse in part, and remand with instructions.

FACTS

Gary Hubbuch owns a parcel of land in Harrison County worth approximately $46,100.00. Hubbuch had always timely paid his property taxes until 2002, when he failed to pay his taxes for 2003, and the property was declared delinquent.

> In August 2004, an envelope with the return address of "Harrison County Auditor's Office, 300 N. Capitol Ave., Corydon, IN 47112," was sent by certified mail to Hubbuch at his home address. There is no information or evidence in the record as to what, if anything, was contained in the envelope.
>
> Vinod C. Gupta claims that the "envelope" contained information that unless Hubbuch paid the property tax it would be subject to public sale. IC 6-1.1-24-4. There is no proof to support the allegation. Nobody was home to sign for the envelope, and nobody appeared at the post office to retrieve the letter within the next 15 days. The post office returned the unopened envelope to the Auditor marked "unclaimed".

Appellant's App. p. 2.

On October 8, 2004, Gupta submitted the winning offer of $9000.00 at the public sale of Hubbuch's land. On June 27, 2005, Gupta mailed a certified letter to Hubbuch's home address, notifying him that he had approximately three months in which to exercise his right to redeem the land, which letter was also returned marked "unclaimed." Appellant's App. p. 31.

On November 29, 2005, Gupta filed a petition for an order directing the Auditor to issue him a tax deed. Hubbuch received notice of the petition for tax deed and objected on the ground that he had not received sufficient notice of either the tax sale or that his redemption period was about to run. On June 19, 2006, the trial court ordered the Auditor to issue Gupta a tax deed for Hubbuch's property, concluding that the Auditor's and Gupta's attempts to provide notice to Hubbuch satisfied the requirements of due process.

On August 17, 2006, or fifty-nine days later, Hubbuch appealed from the trial court's order to the trial court, contending that the United States Supreme Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006), decided on April 26, 2006, compelled a different result. On October 18, 2007, the trial court agreed, concluding that Hubbuch had not received sufficient notice of either the tax sale or the running of the redemption period. Consequently, the trial court concluded that the tax deed would not issue to Gupta and, additionally, that the purchase price of $9000.00 would not be returned to him because of his "personal knowledge" of his failure to notify Hubbuch of the tax sale and failure to notify Hubbuch of the running of his right to redemption. Appellant's App. p. 29.

DISCUSSION AND DECISION

Tax Sale Procedures

The State may sell privately-owned real property on which property taxes are delinquent if certain prerequisites are met. Among these are that the county auditor must, not less than twenty-one days before the earliest date on which an order for the sale of the property in question may be issued, send a notice of the sale to the owner of the property.

Ind. Code § 6-1.1-24-4(a) (2006). Once the tax sale has occurred, other steps must be taken before a tax deed can be issued to the tax sale purchaser.

> A purchaser of Indiana real property that is sold for delinquent taxes initially receives a certificate of sale. Ind. Code Ann. § 6-1.1-24-9 (West Supp. 1998). A one-year redemption period ensues. Ind. Code Ann. § 6-1.1-25-1 (West 1998); Ind. Code Ann. § 6-11-25-4 (West Supp. 1998). If the owners fail to redeem the property during that year, a purchaser who has complied with the statutory requirements is entitled to a tax deed. *Id*. The property owner and any person with a "substantial property interest of public record" must each be given two [additional] notices. Ind. Code Ann. §§ 6-1.1-25-4.5, -4.6 (West Supp. 1998).
>
> The first notice announces the fact of the sale, the date the redemption period will expire, and the date on or after which a tax deed petition will be filed. Ind. Code Ann. § 6-1.1-25-4.5 (West Supp. 1998). The second notice announces that the purchaser has petitioned for a tax deed. Ind. Code Ann.§ 6-1.1-25-4.6 (West Supp. 1998).

Tax Certificate Invs. v. Smethers, 714 N.E.2d 131, 133 (Ind. 1999). The two additional notices are to be provided this time by the tax sale purchaser, not the county auditor. *See* Ind. Code §§ 6-1.1-25-4.5(a)(3)(A) (2006), -4.6(a) (2006).

Regarding the first notice to be provided by the tax sale purchaser–notice of the sale, right of redemption, and earliest date the petition for tax deed might be filed–Indiana Code 6-1.1-25-4.5 provides, in part, as follows:

> (d) The [tax sale purchaser] shall give the notice by sending a copy of the notice by certified mail to:
>
> (1) the owner of record at the time of the:
>
> (A) sale of the property;
>
> (B) acquisition of the lien on the property under IC 6-1.1-24-6; or
>
> (C) sale of the certificate of sale on the property under IC 6-1.1-24;
>
> at the last address of the owner for the property, as indicated in the records of the county auditor; and
>
> (2) any person with a substantial property interest of public record at the address for the person included in the public record that indicates the interest.

This notice of the right of redemption must be sent no later than nine months after the sale. Ind. Code § 6-1.1-25-4.5(a)(3).

In summary, the Indiana statutory scheme for tax sales provides that the county auditor must send the notice of the tax sale to the owner and the eventual tax sale purchaser must send notice that that sale has occurred, the right of redemption is running, the date on or after which a petition for tax deed may be filed, and, finally, when the petition for tax deed is, in fact filed.[1] In all cases, the statutes require that notice be sent via certified mail to the last known address of the owner as indicated in the county auditor's files, if indicated therein.

I. Whether Hubbuch Could Challenge the Trial Court's Order Under Indiana Trial Rule 60(B)

Gupta contends that Hubbuch was barred from challenging the trial court's original disposition under Indiana Trial Rule 60(B), maintaining that Hubbuch was limited to filing a motion to correct error or direct appeal to this court, either of which would have had to have been initiated within thirty days after the order. *See* Ind. Trial Rule 59(C); Ind. Appellate Rule 9(A). Indiana Code section 6-1.1-25-4.6(h) (2006) provides that "[a] tax deed issued under this section is incontestable except by appeal from the order of the court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court's order[,]" and Hubbuch filed his appeal in the trial court within sixty days.

[1] Neither party disputes that all notices were sent to Hubbuch's address as listed with the Harrison County Auditor and that he did, in fact, receive actual notice of Gupta's filing of petition for tax deed.

In *BP Amoco Corp. v. Szymanski*, 808 N.E.2d 683, 689 (Ind. Ct. App. 2004), *trans. denied*, this court held that an appeal of the issuance of a tax deed could be brought in the trial court either by original action or as a motion for relief from judgment under Trial Rule 60(B). Trial Rule 60(B) provides, in part, that

> [o]n motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
> ….
> (6) the judgment is void[.]

Hubbuch filed what he termed an "appeal" from the trial court's original order fifty-nine days following its issue, so the question is whether his "appeal" is effectively a Trial Rule 60(B) motion.

Gupta contends that Hubbuch's appeal cannot be a Trial Rule 60(B) motion. Gupta's argument in this regard is limited to his specific contention that all Trial Rule 60(B) motions must be accompanied by the presentation of new evidence. Appellant's Br. p. 7. Trial Rule 60(B), however, contains several grounds on which relief from an order may be sought, not

all of which require the presentation of new evidence.[2] In this case, we believe that the basis of Hubbuch's request for relief from judgment most properly would fall under Trial Rule 60(B)(6), as he contended that "the judgment [wa]s void" due to a lack of constitutionally adequate notice. *See Schaefer v. Kumar*, 804 N.E.2d 184, 192 (Ind. Ct. App. 2004) (in case where court concluded that Trial Rule 60(B)(6) motion was proper vehicle for challenging issuance of tax deed, noting that "[a] tax deed is void if the former owner was not given

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[2] Trial Rule 60(B) motions for relief from judgment or order may be granted for the following reasons:

> (1) mistake, surprise, or excusable neglect;
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
> (5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts and such party proves that
> (a) at the time of the action he was an infant or incompetent person, and
> (b) he was not in fact represented by a guardian or other representative, and
> (c) the person against whom the judgment, order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and
> (d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and
> (e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and
> (f) the motion alleges a valid defense or claim;
> (6) the judgment is void;
> (7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

Ind. Trial Rule 60(B).

constitutionally adequate notice of the tax sale proceedings"), *trans. denied*. Because Hubbuch's appeal was based on a new United States Supreme Court decision that established that Gupta's attempts at notice were constitutionally inadequate, the fact that Hubbuch did not present any new evidence is not surprising. This does not mean, however, that his appeal cannot have been a Trial Rule 60(B) motion.

Gupta also notes several factual differences between this case and *BP Amoco*, namely that BP Amoco never had the opportunity to litigate the claim before the original default judgment; that BP Amoco did not have the opportunity to file a timely appeal in this court while Hubbuch did; and that the appeal in the trial court in *BP Amoco*, as an original action, involved the designation of evidence. The *BP Amoco* decision, however, did not depend in any way on these distinctions, nor do we find them otherwise compelling. The factual differences between the two cases are irrelevant to the issue at hand.

Gupta also contends that the trial court was barred from departing from its original ruling because it was bound by *res judicata*. There are four basic elements of *res judicata*, or "claim preclusion": 1) the former judgment must have been rendered by a court of competent jurisdiction; 2) the matter now in issue was, or might have been, determined in the former suit; 3) the particular controversy previously adjudicated must have been between the parties to the present suit or their privies; and 4) the judgment in the former suit must have been rendered on the merits. *Cox v. Indiana Subcontractors Ass'n, Inc.*, 441 N.E.2d 222, 225 (Ind. Ct. App. 1982).

Here, *res judicata* does not apply because Hubbuch was not seeking to relitigate the prior claim, but, rather, was directly attacking the prior judgment.

> [W]hen any fact, question, or issue has been decided by a final judgment of a court of competent jurisdiction to determine such fact, question, or issue, all parties are forever bound by such determination in a subsequent suit or suits between the same parties or their privies, even though the causes of action or the subject matter may be different, *except, of course, when the subsequent litigation is a direct proceeding for the purpose of reversing or setting aside the prior adjudication.*

Riverview Health Care v. Wright, 524 N.E.2d 321, 323 (Ind. Ct. App. 1988) (citation omitted and emphasis added). Because Hubbuch's motion for relief from judgment under Trial Rule 60(B) was a direct attack on the prior judgment, it was not barred by *res judicata*.[3] In conclusion, Hubbuch's appeal to the trial court of its order to issue a tax deed was proper.

II. The Retention of Gupta's Purchase Money

Gupta contends that the trial court erred in ordering that his purchase money not be returned to him. Indiana Code section 6-1.1-25-4.6 (2006) governs petitions for the issuance of tax deeds, and, although it has since been substantially rewritten, at all relevant times provided as follows:

> (a) After the expiration of the redemption period specified in section 4 of this chapter but not later than six (6) months after the expiration of the period of redemption:
>
> (1) the purchaser, the purchaser's assignee, the county executive, or the purchaser of the certificate of sale under IC 6-1.1-24 may; or

[3] It is worth noting that, were we to accept Gupta's argument on this point, neither a motion for relief from judgment nor a motion to correct error could ever be properly granted, and most appeals to a higher court would be barred, as the same issues involving the same parties had already been decided on the merits by a court of competent jurisdiction.

(2) in a county where the county auditor and county treasurer have an agreement under section 4.7 of this chapter, the county auditor shall, upon the request of the purchaser or the purchaser's assignee;

file a verified petition in the same court and under the same cause number in which the judgment of sale was entered asking the court to direct the county auditor to issue a tax deed if the real property is not redeemed from the sale. Notice of the filing of this petition shall be given to the same parties and in the same manner as provided in section 4.5 of this chapter, except that, if notice is given by publication, only one (1) publication is required. The notice required by this section is considered sufficient if the notice is sent to the address required by section 4.5(d) of this chapter. Any person owning or having an interest in the tract or real property may file a written objection to the petition with the court not later than thirty (30) days after the date the petition was filed. If a written objection is timely filed, the court shall conduct a hearing on the objection.

(b) Not later than sixty-one (61) days after the petition is filed under subsection (a), the court shall enter an order directing the county auditor (on the production of the certificate of sale and a copy of the order) to issue to the petitioner a tax deed if the court finds that the following conditions exist:

(1) The time of redemption has expired.

(2) The tract or real property has not been redeemed from the sale before the expiration of the period of redemption specified in section 4 of this chapter.

(3) Except with respect to a petition for the issuance of a tax deed under a sale of the certificate of sale on the property under IC 6-1.1-24-6.1, all taxes and special assessments, penalties, and costs have been paid.

(4) The notices required by this section and section 4.5 of this chapter have been given.

(5) The petitioner has complied with all the provisions of law entitling the petitioner to a deed.

The county auditor shall execute deeds issued under this subsection in the name of the state under the county auditor's name. If a certificate of sale is lost before the execution of a deed, the county auditor shall issue a replacement certificate if the county auditor is satisfied that the original certificate existed.

….

(d) Except as provided in subsections (e) and (f), if the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the petitioner under subsection (a) to fulfill the requirements of this section, the court shall order the return of the purchase price minus a penalty of twenty-five percent (25%) of the amount of the

purchase price. Penalties paid under this subsection shall be deposited in the county general fund.

(e) Notwithstanding subsection (d), in all cases in which:

(1) the petitioner under subsection (a) has made a bona fide attempt to comply with the statutory requirements under subsection (b) for the issuance of the tax deed but has failed to comply with these requirements; and

(2) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure to comply with these requirements;

the county auditor shall not execute the deed but shall refund the purchase money plus six percent (6%) interest per annum from the county treasury to the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24. The tract or item of real property, if it is then eligible for sale under IC 6-1.1-24, shall be placed on the delinquent list as an initial offering under IC 6-1.1-24-6.[4]

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[4] In 2007, the General Assembly rewrote subsections (d) and (e) to read as follows, effective April 26, 2007, and applying to tax sales held after June 30, 2007:

(d) Except as provided in subsections (e) and (f), if:

(1) the verified petition referred to in subsection (a) is timely filed; and

(2) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the petitioner under subsection (a) to fulfill the notice requirement of subsection (a);

the court shall order the return of the amount, if any, by which the purchase price exceeds the minimum bid on the property under IC 6-1.1-24-5(e) minus a penalty of twenty-five percent (25%) of that excess. The petitioner is prohibited from participating in any manner in the next succeeding tax sale in the county under IC 6-1.1-24. The county auditor shall deposit penalties paid under this subsection in the county general fund.

(e) Notwithstanding subsection (d), in all cases in which:

(1) the verified petition referred to in subsection (a) is timely filed;

(2) the petitioner under subsection (a) has made a bona fide attempt to comply with the statutory requirements under subsection (b) for the issuance of the tax deed but has failed to comply with these requirements;

(3) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure to comply with these requirements; and

(4) the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24 files a claim with the county auditor for refund not later than thirty (30) days after the entry of the order of the court refusing to direct the county auditor to execute and deliver the tax deed;

the county auditor shall not execute the deed but shall refund the purchase money minus a penalty of twenty-five percent (25%) of the purchase money from the county treasury to the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24. The county auditor shall deposit penalties paid under this subsection in the county general fund. All the delinquent taxes and special assessments shall then be

(f) Notwithstanding subsections (d) and (e), the court shall not order the return of the purchase price or any part of the purchase price if:
(1) the purchaser or the purchaser of the certificate of sale under IC 6-1.1-24 has failed to provide notice or has provided insufficient notice as required by section 4.5 of this chapter; and
(2) the sale is otherwise valid.

Here, pursuant to Indiana Code section 6-1.1-25-4.6(f)(1) (2006), the trial court ordered that none of Gupta's purchase price of $9000.00 be returned to him due to what it termed his "personal knowledge" of the failure to notice of tax sale and for his failure to provide notice of right to redeem property. Appellant's App. p. 23. If, on the other hand, Gupta made a bona fide effort to comply with the notice requirements of Indiana Code sections 6-1.1-24-4 and 6-1.1-25-4.5, he would be entitled to a refund of the entire purchase price plus six percent annual interest. *See* Ind. Code § 6-1.1-25-4.6(e) (2006).

We conclude, as a matter of law, that Gupta made a bona fide attempt to comply with relevant statutory notice requirements. First, we note that the responsibility of providing the first of the three notices, the notice of the tax sale, lies solely with the county auditor, not with any prospective purchaser. Ind. Code § 6-1.1-24-4(a). While a failure on the part of the county auditor to give sufficient notice of an impending tax sale to the owner violates due process, as it did here, it was not *Gupta's* failure. Proper notice of the tax sale is relevant to the question of whether the sale violates due process, but it is irrelevant to the question of

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reinstated and recharged to the tax duplicate and collected in the same manner as if the property had not been offered for sale. The tract or item of real property, if it is then eligible for sale under IC 6-1.1-24, shall be placed on the delinquent list as an initial offering under IC 6-1.1-24.

2007 Ind. Acts 1379-81, 1384.

whether the tax sale purchaser "has failed to provide notice or has provided insufficient notice as required by section 4.5 of this chapter[.]" Ind. Code § 6-1.1-25-4.6(f)(1) (2006).

As for the notice of the running of the right of redemption, we conclude that, not only did Gupta make a bona fide effort to comply with notice requirements, he did, in fact, fully comply with those requirements as they existed at the time. As previously mentioned, Indiana Code section 6-1.1-25-4.5(d) requires that notice be sent via certified mail to the owner "at the last address of the owner of the property, as indicated in the records of the county auditor[.]" This is precisely what Gupta did in June of 2005, and that was enough at the time. In November of 2004, this court decided *Oliverio v. Chumley*, 817 N.E.2d 660 (Ind. Ct. App. 2004), in which we concluded that strict compliance with the statutory requirements constituted sufficient notice. *Id*. at 662 ("Here, Chumley followed the statute and sent the proper notices to the Oliverios by certified mail to the address the Pulaski County Auditor had on file. Our reading of the plain language of the statute indicates that that was the extent of Chumley's obligation."). In April of 2006, of course, the United States Supreme Court established that Gupta's attempt to serve notice on Hubbuch was not, in fact, sufficient to satisfy due process. *See Flowers*, 547 U.S. at 239 ("In this case, the State is exerting extraordinary power against a property owner–taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed."). However deficient Gupta's attempt at notice turned out to be under *Flowers*, decided nearly a year later, he fully complied with the law as it was at the time. Under the circumstances, concluding that Gupta

"failed" to provide notice is tantamount to punishing him for failing to have sufficient powers of prognostication. We conclude that Gupta made a bona fide attempt to comply with the notice requirements of Indiana Code chapter 6-1.1-25, and is therefore entitled to a full refund of his purchase price, plus six percent annual interest.

Conclusion

We conclude that Hubbuch properly appealed the grant of tax deed to Gupta in the trial court pursuant to a Trial Rule 60(B) motion. We also conclude that Gupta made a bona fide effort to comply with the notice requirements of Indiana Code chapter 6-1.1-25. We affirm the trial court's refusal to grant a tax deed to Gupta but remand for a refund of Gupta's purchase price and calculation of interest due to him.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions.

BARNES, J., and CRONE, J., concur.